

## ADMINISTRATIVE LAW JUDGE'S RULING

Respondent, Illinois Bell Telephone Company ("SBC"), filed a Motion to Dismiss ("Motion") certain claims brought by Complainants, Avenue Business Center, Inc., and Execuspace, Inc. (together, "ABC"). ABC opposes the Motion. The Motion presents two grounds for dismissal. This Ruling will address one of those – that ABC seeks recovery for matters outside this Commission's authority.

### Yellow Pages ("YP")

ABC complains that SBC billed it for YP advertising despite being "instructed by [ABC] not to place advertising for its tenants that would be billed to [ABC]." ABC Pre-Hearing Brief at 3. SBC argues that the "publishing, distribution and billing of [YP] advertising are not telecommunications services" under Section 13-203 of the Public Utilities Act ("Act"), 220 ILCS 5/13-203. Motion at 4. Therefore, SBC contends, the Commission cannot entertain a complaint concerning YP billing under its complaint jurisdiction. SBC additionally asserts that ABC cannot complain against SBC regarding YP services, because SBC is not the provider of those services.

ABC emphasizes that the instant complaint was brought under Section 10-108 of the Act, which authorizes claims concerning "any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission." 220 ILCS 5/10-108. According to ABC, a "provision of this Act" purportedly violated in this instance is Section 9-252.1, which states, in relevant part:

When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error either in charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest from the date of overpayment at the legal rate or at a rate prescribed by rule of the Commission.

### 220 ILCS 5/9-252.1

ABC further maintains that nothing in Section 252.1 limits that statute to bills pertaining to telecommunications services regulated by this Commission under the Act. While acknowledging that the Commission cannot regulate the rates for services such as YP advertising, ABC avers that the Commission can nevertheless order refunds for billing errors associated with those services.

The parties thus frame this question – under Section 252.1, what is the scope of liability for a billing utility with respect to "measurement" errors concerning billed services that the billing utility does not provide and that this

Commission cannot regulate under the Act? Indeed, with specific regard to YP advertising, this question requires further refinement, because the term “regulate” arguably presumes the existence of some degree of jurisdiction over the subject, and puts the focus on the extent of the Commission’s power under that jurisdiction (that is, the continuum of the Commission’s power, ranging from mere power to resolve complaints to the greater power to control the terms and conditions of service<sup>1</sup>). In the case of YP advertising, this Commission has no apparent jurisdiction at all. It has no authority over YP providers or YP ad rates, ad content or any of the terms and conditions under which such ads are procured or presented.

The only potential meeting place for Commission jurisdiction and YP advertising is on the SBC bill, over which the Commission has statutory authority, pursuant to, *inter alia*, Section 9-252.1. However, while Section 13-101 applies the Commission’s power, under Section 9-252.1, to competitive services (as well as noncompetitive services), those services must be *telecommunications* services<sup>2</sup>. SBC accurately asserts that YP advertisements are not telecommunications services within the meaning of Section 13-203. A printed advertisement about an enterprise or other entity does not constitute the “transmittal of information” by “electromagnetic transmission” and is not an instrumentality, facility, apparatus or service “used to provide such transmission,” as that statute requires.

Moreover, irrespective of the service addressed on the utility’s bill, the Commission’s power under 9-252.1 extends solely to a billing that is “incorrect due to an error...in measuring the quantity or volume of service provided.” ABC does not allege such an error. Rather, ABC claims that it “should not be billed for any [YP] advertising placed by tenants.” ABC Pre-Hearing Brief at 3. That is not an error in measuring service quantity, even in light of the definition articulated in Consolidated Communications Consultant Services v. Illinois Bell Telephone, Docket 99-0429, Order, June 14, 2001 (“quantity...of service provided’ now additionally pertains to the individual components of a packaged service, as it has heretofore pertained to the units of a single measured service”). ABC’s complaint is that SBC billed *the wrong party* (i.e., ABC, instead of ABC’s tenants) for YP ads. Section 9-252.1 does not address such errors. Therefore, with regard to *any* service, Commission power under Section 9-252.1 extends only to measurement errors (as defined above), not to the wrong claimed by ABC.

There are theoretically conceivable circumstances under which the Commission, by virtue of its jurisdiction over *utilities* (under 220 ILCS 5/4-101),

---

<sup>1</sup> This range of power is exemplified by Section 13-101 of the Act, 220 ILCS 5/13-101, which preserves the Commission’s power to regulate the terms and conditions of service for noncompetitive telecommunications services, but limits its power over competitive telecommunications services to, *inter alia*, complaint jurisdiction under Section 9-252.1. See, Wernikoff v. RCN Telecom Services, 341 Ill.App.3d 89, 791 N.E. 2d 1195 (2003).

<sup>2</sup> “9-252.1...[is] equally applicable to competitive *telecommunications rates and services*, and the regulation thereof....” 220 ILCS 5/13-101 (emphasis added)

and over *utility bills* (under Section 9-252.1), could entertain a complaint concerning *the utility's billing* for a service that is not a telecommunications service. If a bill were incorrect due to an error in charging more than the tariffed rate or a measurement mistake, and *if the billing telecommunications carrier caused the bill to be quantitatively incorrect* (e.g., by incorrectly reporting the charges transmitted to the billing carrier by the service provider), then the Commission could exercise its jurisdiction *over the utility and its bill* – not the service (in the case of a non-telecommunications service) – and hear the complaint. That is not the case here, however, since ABC does not allege that SBC caused the billed amount to be quantitatively incorrect.

Rather, ABC's YP claim is that a publishing entity the Commission does not regulate provided advertising services over which the Commission has no jurisdiction to persons the Commission does not regulate, then held ABC responsible for the purchase price of those services. By hearing that claim, the Commission would expand its jurisdiction beyond statutory limits, expend Commission resources on a dispute that belongs in a judicial forum, and cause the billing utility to defend (by itself) the publishing entity's conduct. ABC's YP claim must be dismissed.

### Call Blocking

#### Toll

ABC contends that SBC billed for toll calls even though ABC had selected a toll provider and "was billed directly by that provider." ABC Pre-Hearing Brief at 3. Therefore, ABC charges, "any long distance billing from [SBC] was the result of slamming or SBC's acceptance of long distance calls other than through the [ABC] preferred long distance provider." *Id.*

Regarding SBC's call "acceptance," the wrong allegedly committed by SBC is not apparent. ABC does not claim to have requested blocking for long distance calls using non-PIC toll providers (even assuming *arguendo* that a failure to block could be cognizable under Section 252.1). The parties that harmed ABC by evading ABC's toll PIC would be ABC's tenants, not SBC, which merely included the associated toll charges on its bills (presumably, pursuant to billing-and-collection agreements with the toll providers involved).

Furthermore, the toll charges at issue are not charges for SBC local or intraLATA services. "The Federal Communications Act of 1934 has given the [FCC] exclusive authority to regulate interstate and international communication." Illinois Telephone Corporation v. Illinois Commerce Commission, 260 Ill. App.3d 919, 922 (1994). Thus, even though the pertinent charges, unlike YP charges, are for telecommunications services, those services are not within the province of this Commission. Section 9-252.1 does not overcome the reservation of jurisdiction by a superior sovereign. Again, had SBC incorrectly reported the

charges for FCC-regulated services, this Commission could hold SBC responsible, under Section 9-252.1, for the inaccuracy of its bill. That is not ABC's allegation here, however.

As for slamming, SBC rightly emphasizes that this Commission has not taken the necessary steps to acquire authority to administer the FCC's anti-slamming rules and, further, that those rules make the slamming toll carrier, not the billing LEC, the responsible party. Motion at 6. Thus, the proper forum for ABC's charge is the FCC, and the proper respondent, on the facts presented, is the slamming carrier.

Moreover, neither SBC's "acceptance" of outbound toll calls using non-PIC carriers, nor its presentation of bills by slamming toll providers, would contravene Section 9-252.1. Such actions do not constitute measurement errors, even within the expanded definition of Consolidated Communications Consultant Services. Rather, they involve the use of unauthorized carriers, resulting either from tenant volition or toll carrier interference.

#### Collect/third-party/conference/voicenet services

ABC asserts that it did request blocking of these calls (collectively referred to here, for convenience (and not as a term of art in the telecommunications industry), as "enhanced calls"). ABC Pre-Hearing Brief at 3. Such enhanced calls are local telecommunications services provided by SBC (as is the blocking of those services). Consequently, the issue, at this procedural juncture, is whether SBC's alleged failure to block the enhanced calls is cognizable under Section 9-252.1.

The language of 9-252.1 cannot be stretched to include blocking failure. Such failure is neither a measurement error nor a charge in excess of a published rate. However, that failure is cognizable, at least arguably, under Section 9-252, which addresses "excessive" charges for services (in this instance, the charges for services that ABC claims should have been blocked)<sup>3</sup>. Accordingly, ABC's claim regarding enhanced calls will not be dismissed.

#### 900/976/700 calls

ABC alleges that it requested blocking of these calls (collectively referred to here, for convenience (and not as a term of art in the telecommunications industry), as "commercial calls") on several occasions. ABC Pre-Hearing Brief at 3. ABC correctly stresses that 83 Ill. Adm. Code 772.90(a) obliged SBC to provide such blocking. Nevertheless, ABC avers, SBC billed ABC for commercial calls.

---

<sup>3</sup> ABC did say that "this proceeding is governed by the statute of limitations set out in [Section] 9-252.1. ABC Response to Motion at 2. However, neither ABC's Complaint nor its Pre-Hearing Brief (i.e., the "pleadings") contain this assertion and, further, the assertion will not be interpreted, in the context of a dismissal motion, to exclude the coterminous applicability of other statutes.

SBC acknowledges that some of the commercial call charges involved here were associated with telecommunications services provided by SBC. Motion at 4, fn. 2. Consequently, SBC does not request dismissal of those charges on jurisdictional grounds. *Id.* Even if it did, the ruling regarding enhanced calls, above, would apply to the alleged failure to block local commercial calls. Such failure is arguably cognizable under Section 9-252 (but not under Section 9-252.1, since no measurement error is alleged).

Blocking failure for commercial calls involving the interstate (or international) telecommunications services of other providers is a different story. The Commission lacks jurisdiction over out-of-state services or associated charges. Illinois Telephone Corporation, *supra*. Additionally, Section 9-252 contemplates refund by the utility of charges for services *it* provided. Refunds for services provided *by others* are not contemplated<sup>4</sup>.

In effect, ABC seeks redress for the consequential damages (i.e., the out-of-state commercial calling charges) purportedly resulting from SBC's blocking failure. The Act does provide a judicial remedy for such alleged harm, as expressly provided in Section 5-201 (which authorizes attorney's fees for successful claimants).

Since this Commission has no power to adjudicate SBC's claim with respect to out-of-state commercial calling charges, the Motion will be granted insofar as it is directed at such charges.

### Internet

ABC initially contended that SBC "billed a line for internet service when no such service is provided." Complaint at 2. Subsequently, ABC added that SBC "repeatedly billed for its own Internet services," although ABC had not requested such services. ABC Pre-Hearing Brief at 4. When these allegations are combined, it is not clear if ABC's complaint is about billing for undelivered internet service or billing for delivered internet service that was not requested. Assuming the subject internet service and service provider are within this Commission's jurisdiction, undelivered service would be cognizable under Sections 9-252 and 9-252.1, while delivered but unwanted service would be arguably cognizable under Section 9-252.

However, SBC maintains that "[d]isputes regarding charges for...enhanced services such as DSL internet, are outside the Commission's authority." Motion at 5. SBC further argues that "[e]nhanced services, such as

---

<sup>4</sup> While refund of SBC's own *blocking* charges could be ordered, the blocking of commercial calls was presumably provided without charge, as mandated by 83 Ill.Adm.Code 772.90(a).

access to the internet, similarly are not regulated as telecommunications services.” Reply in Support of Motion at 7-8.

ABC describes the subject services only as “internet services.” Presumably, these are equivalent to what ABC characterizes as the “telecommunications services that [ABC procures so that its] tenants can...connect to the Internet.” ABC Pre-Hearing Brief at 4. Although SBC mentions “DSL internet,” ABC does not use that term. Similarly, while SBC states that the subject services were provided by an SBC affiliate and by Sprint, ABC calls them SBC’s own services. Consequently, the services in question are not definitively identified in ABC’s pleadings, which clouds the application of legal principles to those services.

SBC does seem to argue that *any* “internet service” is beyond this Commission’s authority. However, the case it relies upon, Howard v. America on Line, 208 F.3d 741 (9<sup>th</sup> Cir. 2000), concludes only that an internet service provider is not a “common carrier” for purposes of federal telecommunications law and, for that reason, cannot be federally regulated. The status of the pertinent services under Illinois law, including their status as telecommunications services and as intrastate (versus interstate) services, cannot be determined with certainty without definitive identification of those services.

It is highly probable that the services and service provider(s) involved here are not intrastate telecommunications services. Therefore, it is highly probable that they are beyond this Commission’s jurisdiction. Nonetheless, dismissal motions are subject to strict and settled rules requiring that all factual doubts be resolved in the claimant’s favor. Accordingly, a ruling on the motion to dismiss ABC’s “internet service” claims will be withheld until the nature of those services is fully identified.

### Summary

The motion is granted with respect to YP advertising charges. It is also granted with regard to the alleged failure to block toll calls and commercial calls (as defined above), insofar as the latter involved interstate or international services. The Motion is denied with respect to enhanced calls (as defined above). Ruling is withheld regarding internet services.